**Watts Electric Corp. *and* International Brotherhood of Electrical Workers, Local Union 728.** Case 12–CA–17084

May 16, 1997

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On February 25, 1997, Administrative Law Judge Howard I. Grossman issued the attached bench decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order, except that the attached notice is substituted for that of the administrative law judge.[2]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Watts Electric Corp., Stuart, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent, in its exceptions, contends that the judge erred in finding that Mitchell Pace was a credible witness because the judge mistakenly believed that Pace was a company employee at the time of the hearing. In affirming the judge's credibility resolution, we note that although Pace was laid off at the time of the hearing, this fact does not detract from the judge's determination that Pace was a credible witness based on Pace's truthful appearance and credible demeanor.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT impliedly threaten employees with discharge if they engage in union or other protected concerted activity.

WE WILL NOT discourage membership in International Brotherhood of Electrical Workers, Local Union 728, or any other labor organization, by discharging or otherwise discriminating against employees because of their union membership or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Thomas Mittelbrun whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Mittelbrun and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WATTS ELECTRIC CORP.

*Jennifer Burgess-Solomon, Esq.*, for the General Counsel.
*Charles Robinson Fawsett, Esq. (Shutts & Bowen)*, of Orlando, Florida, for the Respondent.
*Mr. John Richard Creasman*, Business Agent and Organizer, of West Palm Beach, Florida, for the Charging Party.

## BENCH DECISION

On the basis of an original charge served by certified mail on April 24, 1995, and an amended charge served by regular mail on June 27, 1996,[1] an amended complaint issued on August 22, 1996. It alleged that Watts Electric Corp. (Respondent), discharged employee Thomas Mittelbrun on or about April 10, 1995, because of his union and other protected activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). It also alleged that, in mid-April 1995, Respondent impliedly threatened its employees with discharge because of their union membership and activities.

[1] The General Counsel's exhibit file does not include a copy of the amended charge. However, the amended complaint alleges that it was filed on June 27, 1996. This allegation was corroborated by Respondent in final argument, as well as the substance of the amended charge. Accordingly, its absence from the formal file is not significant.

I heard this case in Miami, Florida, on January 23 and 24, 1997. On the latter date, I issued a bench decision in favor of the General Counsel. I found that Mittelbrun did not quit, as alleged by Respondent, but was discharged by Respondent. I further held that an admitted supervisor told an employee that Mittelbrun's distribution of union flyers was part of the reason he was discharged. Based on this fact, Respondent's receipt of a letter from the Union stating that he was engaged in organizational activity, the timing of the discharge a day or two later, and Respondent's failure to assign Mittelbrun to a project where it needed employees, I concluded that the General Counsel had established a prima facie case that Mittelbrun's union activities were a factor in Respondent's decision to discharge him. I further agreed with the complaint allegation that the supervisor's statement to an employee that Mittlebrun was discharged in part because of his distribution of union flyers constituted an implied threat that employees engaged in union activity would be discharged. In addition, it manifested Respondent's antiunion animus. Finally, I concluded, Respondent had not rebutted the General Counsel's prima facie case, as required by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 303 (1983); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

I certify the accuracy of the portion of the trial transcript containing my decision (pp. 316 to 328), and I attach a copy of that portion of transcript, with corrections [made], as "Appendix A."[2]

## CONCLUSION OF LAW

Based on the record, I find that Respondent violated the Act as alleged in the complaint, that Respondent is an employer engaged in commerce, and that its violations of the Act affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The record shows that Respondent offered Mittelbrun reinstatement to his former job on January 13, 1996, and that Mittelbrun declined because he was otherwise employed.[3] Accordingly, Respondent is not required to make a further offer of employment. However, Respondent is still required to make Mittelbrun whole for the period from his unlawful discharge on April 10, 1995, to January 13, 1996, the date of the offer of employment, for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by paying him a sum of money equal to the amount he would have earned from the time of the discrimination against him to the date of the offer of reinstatement, less net earnings during such period, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

I shall also recommend an order that Respondent remove from its records any references to its discharge of Mittelbrun, and notify him in writing that this has been done and that its discharge of him will not, in the event of his future employment, be used as the basis of any future discipline of him. I shall also recommend the posting of notices.

On these findings, conclusions of law and on the entire record, I issue the following recommended[5]

## ORDER

The Respondent, Watts Electric Corp., Stuart, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly threatening its employees with discharge because of their union membership, activities, and sympathies.

(b) Discouraging membership in International Brotherhood of Electrical Workers, Local Union 728, AFL–CIO, or any other labor organization, by discharging employees because of their union activities or other concerted protected activity, or by otherwise discriminating against them.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Thomas Mittelbrun whole for any loss he may have suffered from the date of his unlawful discharge on April 10, 1995, in the manner set forth in the remedy section of this decision.

(b) Within 14 days of the date of this Order, remove from its file any reference to the unlawful discharge of Thomas Mittelbrun, and within 3 days thereafter notify him in writing that this has been done and that it will not use the discharge against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Regional Director for Region 12, post at its place of business at Stuart, Florida, copies of the attached notice marked "Appendix B."[6] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's au-

[2] Certain errors in the transcript have been noted and corrected.

[3] R. Exhs. 3 and 4. I credit John Worrel's testimony as to the authenticity of these letters. Further, I note the similarity between Mittelbrun's signature on his letter (R. Exh. 1; G.C. Exh. 2). Accordingly, I receive R. Exhs. 3 and 4 on my own motion.

[4] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1988 amendment to 28 U.S.C. §66231. Interest accrued before January 7, 1997, the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

thorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 24, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

## APPENDIX A

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. . . away.

JUDGE GROSSMAN: Thank you, Mr. Fawsett. I'll allow rebuttal and, if made, surrebuttal.

MS. BURGESS-SOLOMON: Your Honor, I have nothing further to state. I think that my opening statement has—

JUDGE GROSSMAN: She has nothing further to say.

MR. FAWSETT: In that case, I guess I don't either.

JUDGE GROSSMAN: I find as alleged in the Complaint and admitted by Respondent, that the original charge in the proceeding was filed by the Union on April 24th, 1995, and a copy was served by Certified Mail on that date.

I also find that the amended charge was filed by the Union on June 27, 1996, and a copy was served by regular mail.

I also find that Respondent is a Florida corporation with an office and place of business in Stuart, Florida, and has been engaged in the building and construction business as an electrical contractor.

I find, as alleged and admitted by Respondent, that during calendar year 1994, Respondent in the course of its operations purchased and received at its Stuart, Florida facility and its Florida jobsites, products, goods, materials and equipment valued in excess of $50,000 from other enterprises located within the State of Florida, each of which other enterprises had received the said products, goods, materials and equipment in interstate commerce, directly from points outside the State of Florida.

I also find, as alleged and admitted by Respondent, that during the calendar year 1994 Respondent, in the course of conduct of its operations described above, Respondent provided services valued in excess of $50,000 for enterprises within the State of Florida, each of which enterprises is directly engaged—correct that.

I find that it provided to one such enterprise services valued in excess of $50,000, which enterprise is directly engaged in interstate commerce, meeting a Board standard for the assertion of jurisdiction, exclusive and indirect inflow or indirect outflow.

As admitted by Respondent, I find that Respondent has been an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also agree as stipulated by the parties at the hearing, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

I also find, as admitted by Respondent, that Mr. John Worrell was President of Respondent and that Duane Becker was a project manager, and that both were supervisors of Respondent and Respondent's agents within the meaning of the Act.

I'm going to go over the factual situation briefly and get down to the salient points of credibility resolutions.

I adopt the General Counsel's outline of the background of the case, including the hiring, the security clearance, the initial interview with Mr. Worrell, and the fact that Mittelbrun was assigned to interim employment at the Northrup-Grumman job for approximately three weeks before receiving notification of security clearance.

I also find that, in fact, he did give out Union flyers at Northrup-Grumman. This is his testimony, the testimony of Mitchell Pace and Gregory Quintana, and the statement of Becker's affidavit, plus the fact that the flyer is in evidence.

He did do that during the period preceding his supposed reporting to the Florida Power & Light job.

I also find and it's undisputed that on April 7th, the company received a letter from the Union stating that Mittelbrun was engaged in organizational activities. That's General Counsel's Exhibit 10. The same letter, which had been sent by the Union is also in evidence.

Now, we come down to the disputed events of April 6th and April 7th. Now, according to the Becker affidavit, Mr. Worrell called on Thursday, April 6th, said that Mittelbrun had cleared the FPL and could start there on Friday, April 7th.

Becker allegedly told Mittelbrun to check with Worrell and show up at the Florida Power & Light facility on Friday at 6:45 a.m. Mittelbrun allegedly said okay.

Further, according to the Becker affidavit, Mittelbrun showed up at the Northrup-Grumman jobsite Friday and told Becker that he had to talk to Worrell.

That's the version given of the Becker affidavit. Mittelbrun denies that Becker said anything at all about the Florida Power & Light job.

The parties stipulated that Joan Genovese was then an employee of Respondent and spoke for management. Mrs. Kathleen Mittelbrun testified that Ms. Genovese left a message on their answering machine on April 7th.

Mrs. Mittelbrun called and Ms. Genovese said that Mr. Mittelbrun had cleared the Florida Power & Light security and either should or could report there at 7:00 p.m. Mrs. Mittelbrun said he had already gone to work and Ms. Genovese then said all right, have him call Monday morning.

Kathleen Mittelbrun was a very credible witness. I watched her closely as she testified. I discerned no untruthfulness in her demeanor.

Further, her testimony was uncontradicted. I therefore credit that testimony as to that conversation between Kathleen Mittelbrun and Joan Genovese on April 7th.

I'll make a credibility resolution as to when Mittelbrun received notification of his clearance and his instruction to report, alleged instruction to report at the Florida Power & Light Company.

But let me preface this by stating that this factual determination is not crucial to the resolution of the relevant issues

in the case, which depend upon other credibility resolutions. None the less, I will make it.

Ms. Genovese's telephone call to the Mittelbrun residence on April 7th and her conversation with Mrs. Mittelbrun on that date is inconsistent with Becker's assertion in his affidavit that he notified Mittelbrun on the prior day, Thursday, which would have been April 6th.

There is no evidence that any attempt was made to call Mittelbrun directly at the Northrup-Grumman jobsite on April 6th. Further, when Mittelbrun showed up at the Northrup-Grumman jobsite on Friday, April 7th, Becker knowing that he was supposed to be—allegedly knowing that he was supposed to be at the Florida Power & Light job, never called Mr. Worrell.

Becker knew that the ultimate job Mr. Mittelbrun was hired for was the Florida Power & Light Company job. And it's puzzling that he would not call Mr. Worrell and notify him that Mittelbrun was not where he was supposed to be.

This is further supported by Mr. Worrell's testimony that he first learned about the absence of Mittelbrun at the Florida Power & Light job on the following Monday.

I accordingly conclude that Mr. Mittelbrun's first knowledge of his alleged instruction to report to Florida Power & Light Company came on Friday, Friday evening in the telephone conversation between Kathy Mittelbrun and Joan Genovese, since in that conversation he was instructed or his wife was instructed to tell him to report at 7:00 p.m., Mrs. Mittelbrun replied that he'd already gone to work and Ms. Genovese then replied all right, have him call Monday morning.

Next, we get to the disputed evidence as to whether or not there was a call from Mittelbrun to Worrell on Monday morning. And according to Mr. Mittelbrun, he called Worrell early in the morning and asked whether he should report to the Florida Power & Light job. According to Mittelbrun, Worrell replied, I'll let you know.

Kathleen Mittelbrun testified that she heard her husband's version or side of this telephone call. Mr. Worrell denies that he received any telephone call from Mittelbrun on Monday. Mr. Worrell's denial is uncorroborated. Mr. Mittelbrun's testimony is corroborated by a very truthful witness.

Respondent raises the argument why would he call, he knew he was supposed to report to the FPL jobsite? On the contrary, Ms. Genovese's instruction to Mrs. Mittelbrun was to have Mr. Mittelbrun call Monday morning. He was simply following the instruction that he received.

I accordingly find that he did make the call and that Mr. Worrell, in response to the inquiry from Mr. Mittelbrun as to where he should report or whether he should go to the FPL jobsite, replied I'll let you know.

I further credit Mr. Mittelbrun's testimony that he did not hear anything from Mr. Worrell the following day.

Now, there was a telephone conversation, by agreement of all the parties, between Mr. Worrell and Mr. Mittelbrun the following date, Tuesday, April the 11th.

According to Mr. Mittelbrun, he called Mr. Worrell again and asked whether he should report to the Florida Power & Light jobsite. According to Mittelbrun, Worrell replied, I don't have anything for you.

According to Mr. Worrell, Mittelbrun called and said he did not want to work at the Florida Power & Light Company, that he wanted to work at Northrup-Grumman. Mr. Worrell replied, I need you at Florida Power & Light.

Mittelbrun said he didn't want to burn any bridges, that he might come back, and Mr. Worrell interpreted this as a statement of resignation or quit by Mr. Mittelbrun.

It is unlikely that Mittelbrun would refuse work, which he needed. As the General Counsel has pointed out, he came down to Florida, bought a house, took other jobs and needed a job. Nobody has testified that Mittelbrun ever refused to work at the Florida Power & Light Company.

As the General Counsel has pointed out, he was interviewed for the job, he was told that FPL was going to be the place that Respondent had to place him, he went through considerable effort to pass the security clearance at the FPL jobsite.

His statement, alleged statement that he didn't want to work there, as in the testimony of Mr. Quintana, was testimony that he wouldn't like to work at FPL and this was testified to—this took place, allegedly, prior to the actual visit to FPL for the security test.

Mr. Mittelbrun knew at the initial interview with Mr. Worrell that the company intended him to work at the FPL jobsite, and he did go through the security testing procedure.

I consider it highly unlikely that the man who needed a job would simply walk away from something for which he had applied and had exerted efforts to obtain.

Respondent argues, to start out with, that there's no evidence of a discharge. Inasmuch as I conclude that Mittelbrun would not have walked away from something that he needed and had applied for, and because he appeared to me to be a credible witness, I credit his statement that Worrell said to him, when he called Tuesday morning and asked whether he should report to FPL, that Worrell then answered, I don't have anything for you.

There is no evidence that he said you're terminated, he said I don't have anything for you. He was not told to go back to the Northrup-Grumman job, which continued for some time after that. He was not told to report to the FPL job, where Mr. Worrell, as he testified, desperately needed workers.

He was simply told, I don't have anything for you. I don't have anything at Watts for you. I don't have any work for you. This is the only possible reading of this statement.

A discharge, in order to be found, need not be stated—I believe the Latin phrase is in haec verba, I probably did not pronounce it correctly, in order to be an exact termination of employment.

If a man says I don't have any work for you, that's the same thing as saying I'm not employing you or if already employed, that you're no longer employed. And I think that statement by Mr. Worrell, in effect, to be an ending of the employment relationship.

Now, the 8(a)(1) allegation about Becker's alleged statement about the flyers, in the first case Becker was an admitted supervisor and as such any statements he made are inputed to Respondent under standard Board law.

Mr. Pace testified that Becker said that Mittelbrun's distribution of the flyers is part of the reason he was terminated.

In his affidavit, Becker admits that Quintana and Pace showed him the flyer, which had been given to them by Mittelbrun, saying this was the first time that he knew about

it and, of course, this event took place several days after Mittelbrun was gone.

He states in his affidavit that they, the two of them, Quintana and Pace, joked about the wages asserted in the flyer. In his affidavit, Becker denies telling them that distribution of the flyer was part of the reason that Mittelbrun was terminated.

He did not give them any reasons to why Mittelbrun was gone, he simply said he was gone. However, Respondent's witness Quintana, testified that Becker said that Mittelbrun had quit, that he did not show up.

Now, Mr. Pace was a credible witness. He was truthful in appearance. I watched him closely as he testified. Not only that, he was a company employee at the time of his testimony, which entitles that testimony to some weight under Board law.

Becker's affidavit corroborates that Quintana and Pace showed him the flyers and talked about wages. These factors, in particular, Pace's credible demeanor, have more probative weight than Becker's denial in his affidavit, and I credit Pace that Becker said that Mittelbrun's distribution of the flyers was a part of the reason for his termination.

This statement was a clear implication that employee participation in Union activities might result in discipline, including discharge.

Respondent argues that the *Redd I* test is not satisfied with respect to this amended charge. Was it the same or similar factual situation?

Well, it was involved in the very heart of this controversy, the distribution of the flyers, Mittelbrun's engaging in organizational activities, as stated in the Union letter.

The same legal theories are involved. Discrimination, an alleged violation of Section 8(a)(3) necessarily involves under law and Board theory, a violation of Section (1). It's a derivative violation.

Would the company have given the same or similar defenses? Obviously, in both cases, its defense is the same, denial.

I therefore conclude that Becker's statement attributed to Respondent was a violation of Section 8(a)(1), in that it tended to interfere with, restrain or coerce employees in the exercise of their statutory Section 7 rights.

Coming now to the issue of whether or not Mittelbrun's termination violated Section 8(a)(3), the test, of course, is the *Wright Line* test. That is, the General Counsel must prove that Union animus was a factor in an Employer's decision to discipline an employee.

It must raise a permissible inference that this, in fact, took place. It was a factor. If the General Counsel establishes this, then Respondent—the burden shifts to the Respondent to establish that the discipline would have taken place in any event.

Has the General Counsel established a prima facia case? First of all, as I have concluded, Mittelbrun did not quit. He was released from work and was told that the Employer had nothing further for him.

Now, although Becker may have had, as Respondent contends, no knowledge of the Union flyers prior to the time that Mittelbrun was released, nonetheless his statement is attributed to Respondent and is evidence of animus.

Mr. Worrell testified that he could not operate as a Union shop because of the wage demands. As argued by the General Counsel, Mr. Mittelbrun's release from employment took place almost simultaneously, in fact the following day or two, work day or two after the company received a notice from the Union that Mr. Mittelbrun was engaging in organization activities.

It's true that Mr. Mittelbrun testified that he wasn't engaged in organizational activities at that time, and he chose to characterize his distribution of the Union flyers as not being organizational activity.

Nonetheless, the Union stated that he was engaged in Union organizational activity and the company received that letter prior to the time that Mr. Mittelbrun was released.

Other evidence of discriminatory motivation lies in the fact that Mr. Worrell never told Mittelbrun why he was not to report to the Florida Power & Light, never told him to report to the Florida Power & Light job when Mr. Worrell needed employees there. He never told him the reason for it.

Mr. Worrell's offer of a job to Business Agent Creasman does not, in my opinion, diminish the probative value of the General Counsel's prima facia case.

Now, Respondent has not rebutted the General Counsel's case. In essence, the Respondent's position is simply denial. This case, of course, depends very much upon the factual resolutions.

The key points in the factual resolutions are based upon credible and in some cases, unrebutted testimony. In particular, that of Kathleen Mittelbrun and Mitchell Pace.

Now, what is an appropriate remedy? Yes, Respondent should be required to post a notice and it should contain an expunction order, that is, notify Mr. Mittelbrun that it has expunged all references in his records as to this unlawful release of Mittelbrun from employment on April 10th, 1995.

Now, there's also evidence that Respondent made an offer of employment to Mittelbrun thereafter, and that he declined. That event would, in my opinion, terminate the back pay period.

This constitutes my decision in the case. You'll get a written copy of it and a copy of the transcript when the Reporting Company issues it.

I want to thank all of the parties for an excellent presentation of their case.

Is there anything further that any party wishes to say at this time, before I close this hearing?

MR. FAWSETT: Not at this time.

MS. BURGESS-SOLOMON: No, your Honor. Thank you.

JUDGE GROSSMAN: All right. Thank you.

**I declare the hearing now closed.**

**(Whereupon, at 12:01 o'clock p.m., the hearing in the above-entitled matter was concluded.)**